

ATTACHMENT 5

Declaration of Jennifer T. Pena

1
2
3
4 **IN THE UNITED STATES DISTRICT COURT**
5 **FOR THE WESTERN DISTRICT OF TEXAS**
6 **AUSTIN DIVISION**

7 _____)
8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 v.)

11 GREG ABBOTT, in his capacity as GOVERNOR)
12 OF THE STATE OF TEXAS, and THE STATE OF)
13 TEXAS,)

14 Defendants.)
15 _____)

Civil Action No. 1:23-cv-00853

16 **DECLARATION OF JENNIFER T. PENA IN SUPPORT OF**
17 **THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION**

18 I, Jennifer T. Pena, do declare as follows:

- 19 1. I am the Chief Legal Counsel for the United States Section of the International
20 Boundary and Water Commission (USIBWC) where I am responsible for legal
21 matters involving the Agency.
22 2. Based on my personal knowledge, as well as information provided to me in the
23 course of my official duties, I declare as follows:

24 **USIBWC's role on the U.S-Mexico Border**

- 25 3. The International Boundary and Water Commission (IBWC) was established to
26 implement treaties between the United States and Mexico. The USIBWC is the
27 United States Section of the IBWC, and Mexico also has a Section of the IBWC
28

(MXIBWC). The two sections work in concert to implement treaty requirements and resolve differences that arise during implementation.

4. The USIBWC is a federal agency when acting on matters within its sole purview and the IBWC is an international organization when the two sections act in concert.
5. The IBWC's predecessor entity, the International Boundary Commission (IBC), was established by the Convention of 1889 between the United States and Mexico. The IBC was tasked with carrying out the principles of the U.S.-Mexico Treaty of 1884, including delineating the international boundary.
6. In 1944, the IBC became the IBWC through a 1944 Treaty between the United States and Mexico called the "Utilization of Waters of the Colorado and Tijuana and of the Rio Grande." In the 1944 Treaty, the United States and Mexico agreed (among other things) how to allocate the waters of the bi-national rivers in the Treaty title, including the Rio Grande.
7. In 1970, the United States and Mexico entered another treaty called the "Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary." With respect to each of those rivers, the United States and Mexico agreed that the international boundary will be the middle of the channel occupied by the normal flow of the river.¹ However, because river channels can shift over time or during large flood events, the countries agreed in the 1970 Treaty to take measures to stabilize and prevent shifts in the Colorado River and Rio Grande.
8. To "reduce to a minimum the shifting of the channels of the Rio Grande[,]" Article IV of the 1970 Treaty provides that, both in the main channel of the river and on adjacent lands, each country "shall prohibit the construction of works in its territory

¹ The IBWC conducts surveys of the international boundary in the Rio Grande and delineates the boundary line.

1 which, in the judgment of the Commission, may cause deflection or obstruction of
2 the normal flow of the river or of its flood flows.”

3 9. In accordance with the 1970 Treaty, the United States and Mexican Sections of the
4 IBWC monitor construction activities along the Rio Grande floodplain and land
5 boundary.

6 10. Proponents of projects within the Rio Grande floodplain submit detailed hydraulic
7 modeling showing any possible deflection. If the modeling shows a deflection or
8 obstruction could impact the boundary line or exacerbate flooding risks, USIBWC
9 works with the project proponent to modify the proposal to mitigate the problematic
10 impacts.

11 11. Both the Mexico and the United States Sections review the modeling, and the United
12 States Section seeks concurrence from Mexico about whether a particular project is
13 acceptable under the 1970 Treaty.
14

15 **Texas’s Buoy System**

16 12. I am familiar with the floating barrier that Texas has placed in the Rio Grande. The
17 barrier has been the subject of a series of correspondence from the Mexican section
18 of the IBWC. Its continued presence in the river is causing injury to the relationship
19 between the two sections and is interfering with the ability of the IBWC to fulfill its
20 mission.

21 13. On or around July 8, 2023, Demetrius Gaines—the Assistant Area Operations
22 Manager at USIBWC’s Amistad Field Office—emailed me pictures depicting buoys
23 and equipment being staged near Eagle Pass, Texas.

24 14. On or around July 11, 2023, and July 18, 2023, Robert Moore—Assistant Chief
25 Counsel, U.S. Customs & Border Protection in Del Rio, Texas—emailed me
26 photographs depicting Texas personnel in military-style uniforms installing a buoy
27 system in the Rio Grande River channel. I emailed these photos to Mario Gomez,
28 Area Operations Manager at USIBWC’s Amistad Field Office.

1 15. The email with the July 11, 2023, photos said that the photos were taken on July 10,
2 2023. The email with the July 18, 2023, photos said that the photos were taken on
3 July 17, 2023.

4 16. On July 14, 2023, MXIBWC reported the installation of a buoy barrier in the Rio
5 Grande. MXIBWC said that construction equipment was in the channel, including a
6 crane boat with a winch, backhoe, speedboat and other equipment and personnel used
7 to assemble, drag and anchor the buoys within the Rio Grande channel. The
8 MXIBWC objected to the placement of the buoys and requested intervention of the
9 United States Section to remove the buoys.

10 17. On July 14, 2023, MXIBWC reported that, as a result of the floating barriers in Eagle
11 Pass, Mexico was canceling a July 24, 2023, meeting concerning water releases to
12 the United States from the Rio Conchos river in Mexico. The meeting was to be
13 between Chihuahua State governmental officials, the USIBWC Commissioner, the
14 MXIBWC Commissioner, and a Commissioner of the Texas Commission on
15 Environmental Quality (TCEQ).

16 18. On July 14, 2023, during a meeting with TCEQ and IBWC to discuss delivery by
17 Mexico to the United States of water of the Rio Grande, the MXIBWC informed the
18 other participants that while Mexico still deemed cooperation over the Rio Grande
19 important, Mexico is concerned about unilateral activities undertaken by the State of
20 Texas that impede the spirit of cooperation necessary to find innovative and mutually
21 beneficial solutions. The MXIBWC team further stated that they are especially
22 concerned about actions subject to the IBWC's jurisdiction that are being undertaken
23 without permission or authorization, directly impacting the IBWC's authority.
24 MXIBWC said that these actions could affect cooperation between the two countries
25 going forward.
26
27
28

1 19. On July 18, 2023, at 11:06 a.m. (Mountain), USIBWC received an email from
2 Rogelio Vargas who identified himself as a Captain with the Texas Army National
3 Guard.

4 20. In the email, Captain Vargas asked what the “legal limitations” are “to perform
5 earthwork along the river’s edge of the Rio Grande River in Eagle Pass, Texas” and
6 requested that USIBWC contact him via phone to discuss the matter.

7 21. USIBWC contacted Captain Vargas via telephone to inform him of the hydraulic
8 modeling required for all projects in the flood plain as well as the permit
9 requirements for proposals on USIBWC-controlled land. In addition, USIBWC
10 passed along contact information for the U.S. Army Corps of Engineers because they
11 also have requirements that apply to work in the river.

12 22. USIBWC summarized the information provided to Captain Vargas in a follow-up
13 email that was sent to him on July 18, 2023, at 3:26 pm (Mountain) and in a later
14 email requested the latitude and longitude of the proposed work. As of July 25, 2023,
15 Captain Vargas has not responded.

16 23. To my knowledge, the July 18, 2023, communication is the first and only
17 communication from Texas that the USIBWC has received requesting information on
18 legal limitations on construction in or near the Rio Grande River.

19
20 **Harms to USIBWC**

21 24. The USIBWC’s mission includes implementing the United States Government’s
22 responsibilities under various treaties between the United States and Mexico.

23 25. The United States and Mexico agreed in 2020 to seek to reach agreement by
24 December 2023 on a new mechanism to improve the predictability and reliability of
25 Rio Grande water delivery from Mexico to the United States. Discussions intended to
26 lead towards this new agreement are at a sensitive stage. By causing Mexico to
27 rethink and limit its cooperation with the United States, Texas’s floating barrier
28

1 interferes with the IBWC's ability to implement its core mission of implementation
2 of the 1944 Water Treaty for deliveries of water on the Rio Grande.

3 26. The 1848 Treaty, art. VII, requires that the entirety of the Rio Grande from New
4 Mexico to the Gulf of Mexico, where it forms an international border, remain "free
5 and common to the vessels and citizens of both countries; and neither shall, without
6 the consent of the other, construct any work that may impede or interrupt, in whole
7 or in part, the exercise of this right." Texas's placement of a buoy barrier system
8 without consulting with USIBWC interferes with the USIBWC's implementation of
9 the Treaty of 1848.

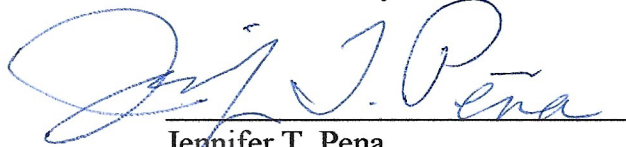
10 27. As explained above in Paragraphs 9 through 11 above, the USIBWC monitors
11 construction activities in accordance with the 1970 Treaty. For the IBWC to
12 determine whether construction works will or will not obstruct or deflect the normal
13 or flood flows of the Rio Grande, the IBWC needs to review hydraulic modeling of
14 the proposed project.

15 28. Texas's placement of the buoy system in the Rio Grande without submitting
16 hydraulic modeling has interfered with the IBWC's ability to determine the extent of
17 obstruction and deflection the buoy system will create to the normal and flood flows
18 of the Rio Grande, and thus interferes with USIBWC's implementation of its treaty
19 authorities.

20 29. Article 2 of the 1944 Treaty states that "the Commission and its personnel may freely
21 carry out their observations, studies, and field work in the territory of either country."
22 Texas's buoy system—as actually constructed and as proposed—interferes with
23 IBWC personnel's ability to freely cross the Rio Grande near Eagle Pass when
24 engaged on official business.
25
26
27
28

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
2 and correct.
3

4 Executed on July 25, 2023

5 
6

7 Jennifer T. Pena

8 USIBWC

9 4191 N. Mesa

10 El Paso, TX 79902
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28